Supreme Court backs dismissal of Bell anti-trust suit

By Ed Gubbins
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The United States Supreme Court this week ruled in favor of Bell companies in upholding a district court's dismissal of an antitrust suit against the carriers. According to the Court, the plaintiffs lacked enough facts to justify what it pointed out would be a very expensive evidence discovery process.

The class action suit, filed on behalf of local phone and Internet subscribers, alleged that Bells worked in parallel to inhibit the growth of competitive local exchange carriers (CLECs) and agreed not to compete against one another, thereby buoying their prices for phone and Internet service. Those actions, the plaintiffs said, violate anti-trust law, which prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."

As evidence of Bells' mutual non-competition agreement, the plaintiffs noted the carriers' decisions not to sell service in one another's territories where it would be lucrative to do so. The plaintiffs also cited comments by Richard Notebaert, who, a few months after becoming chief executive officer of Qwest Communications in 2002, told the Chicago Tribune that competing in another incumbent's territory "might be a good way to turn a quick dollar but that doesn't make it right."

In a 7-2 decision, the Supreme Court argued that the plaintiffs hadn't presented enough facts to suggest "that the resistance to the upstarts was anything more than the natural, unilateral reaction of each [incumbent local exchange carrier] intent on keeping its regional dominance."

In requiring more facts from the plaintiffs, the Court acknowledged the need to take caution in dismissing suits before evidence discovery but pointed to the high cost of anti-trust litigation as a factor in setting the bar high.

"Proceeding to antitrust discovery can be expensive," the Court wrote. "Plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years."

The Supreme Court's decision contradicted an early appeals court decision which argued that, in order to survive the motion to dismiss, plaintiffs would only need to present facts that make Bell collusion "plausible." To dismiss the case, the appeals court wrote, "a court would have to conclude that there is no set of facts that would permit a plaintiff to

demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."

The Supreme Court this week conceded that parallel business conduct was admissible as circumstantial evidence of agreement among the Bells, but added that it alone "falls far short" of conclusively establishing an agreement or constituting a violation of anti-trust law. Parallel behavior in the market, the court said, is, by itself, "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."

To avoid dismissal, the Supreme Court said, plaintiffs needed to show "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."